Abdul Samad bin Hj Alias v The Government of Malaysia & Ors

FEDERAL COURT (KOTA BHARU) — CIVIL APPEAL NO 01-73-1993
MOHD AZMI, WAN ADNAN FCJJ AND SHAIK DAUD JCA
30 AUGUST 1996

Companies and Corporations — *Winding up — Priorities — Whether sales tax due from company to the government was to be paid first before claims of debenture holder — Sales Tax Act 1972 s 70 — Government Proceedings Act 1956 s 10 — Companies Act 1965 ss 191 & 292*

Companies and Corporations — *Winding up — Priorities — Employees' claim for sums due by way of wages — Receiver agreed to claims of employees under Companies Act 1965 s 292(1)(b) — Whether employees entitled to be paid out of floating charge realization or fixed charged realization*

Companies and Corporations — *Winding up — Costs of receivership — Situation where receivership costs can be paid out of either fixed charge realizations or floating charge realization — What is the proper way to determine from which fund the receivership costs should be paid out*

The appellant was appointed by United Asian Bank Bhd ('the bank') as the receiver and manager of Rajiv Enterprises Sdn Bhd ('Rajiv') pursuant to the terms of a debenture. The assets of Rajiv was eventually sold resulting in sum of RM138,343.57 after deduction of the costs of receivership. There were three creditors of Rajiv that compete for the aforesaid sum now in the hands of the appellant. They were: (i) the bank for the sum due and owing under the terms of the debenture; (ii) the Government of Malaysia for the sum due by way of sales tax for the years 1984–1986; and (iii) the employees of Rajiv ('the employees') who claimed the sums due by way of termination benefits, etc pursuant to an award under s 69 of the Employment Act 1955. There were insufficient assets to meet the claims of all the three creditors. The appellant applied to the High Court for directions under s 183(3) of the Companies Act 1965 ('the 1965 Act'). The appellant maintained that the bank was entitled to the sums that were held by the appellant as the sums that were so held were the realizations of assets charged to the bank by virtue of the debenture. The government maintained that they were entitled to priority by reason of s 70 of the Sales Tax Act ('the 1972 Act') or s 10 of the Government Proceedings Act 1956 ('the 1956 Act'). The employees claimed they had priority by reason that their claim fell within the definition of 'worker's compensation' in s 191 when read together with s 292(c) of the 1965 Act. However, in his written submission, counsel for the employees conceded that the employees were entitled to and they now claimed only the sum RM21,000 under s 292(1)(b) of the 1965 Act. This claim was agreed to by the appellant. The High Court directed that the claims of the government in respect of sales tax assessed pursuant to the 1972 Act be paid in priority to the claims

of the bank as the debenture holder. The appellant appealed. The government maintained that in order to determine the issue of the conflicting claims, the court should only look at the provisions of the 1972 Act and that the provisions of ss 191 and 292 of the 1965 Act and s 10 of the 1956 Act were entirely irrelevant. It was argued that all monies collected by a taxable person as sales tax from the purchasers were collected on behalf of the government and thus, the monies collected belonged to the government and the question of priority did not arise.

Held, allowing the appeal:

(1) It must now be regarded as settled that ss 69 and 70 of the 1972 Act do not operate to confer any priority for sales tax over other debts and that s 292(1) of the 1965 Act must be read as an exception to the general provisions of s 10(1) of the 1956 Act (see p 591F); *Director of Customs, Federal Territory v Ler Cheng Chye (Liquidator of Castwell Sdn Bhd, in liquidation)* [1995] 2 MLJ 600 followed.

(2) It is erroneous to say that the provisions of ss 191 and 292 of the 1965 Act do not apply. Once a receiver has been appointed, ss 191 and 292 will come into play. Whilst it is true that a taxable persons collects the sales tax for the government, the government cannot claim priority over such monies once a receiver has been appointed. The argument will be tenable only if the monies collected by Rajiv as sales tax were put into a separate special account. But, there is no evidence that monies collected as sales tax were put into such an account. They must have been put into the mixed account of Rajiv (see pp 591I and 592A–B).

(3) Therefore, the trial judge was wrong in directing that sales tax due to the government be paid in priority to the claim of the debenture holder (see p 592B–C).

(4) Since the claim by the employees for the sum of RM21,000 was agreed to by the appellant, there was therefore no dispute between the appellant and the employees that the employees were entitled to be paid that sum in priority to the claim of the debenture holder. But, the employees are only entitled to be paid out of floating charge realizations and not out of fixed charge realizations (see p 593H).

(5) The sum of RM20,000 which was the forfeiture of a deposit for the sale of fixed assets should be considered as a fixed charge realization and thus not available for distribution to the employees (see p 594A).

(6) Not all of the floating charge was available for distribution to the employees. A portion of that sum must first be used to satisfy a portion of the costs and expenses of the receivership (see p 594B–C).

(7) By the terms of the debenture, the receivership costs are given first priority over all other claims including that of the debenture holder. The said costs also have priority over the claim of the bank to be paid out of the assets subject to the fixed charge. Accordingly, the receivership costs can be paid out of either the fixed charge realizations or floting charge realizations as the debenture was silent on this maiter (see p 594C, E–F).

(8) The amount that the bank and the employees would actually receive in satisfaction of their claims would depend on which fund the receivership costs were paid out (see p 594G–H).

(9) The proper way was to apportion the receivership costs between the floating charge realizations fund and the fixed charge realizations fund. In order to do that, there must first be an assessment as to the costs of realizing the fixed charge assets and the floating charge assets and the costs of carrying on of the business of the company to obtain the floating charge realizations fund. Then, the costs of realizing the fixed charge assets should be deducted from the fixed charge realizations and the costs of realizing the floating charge realizations should be deducted from the floating charge realizations fund. In relation to costs that cannot be attributed towards the realizations of either the fixed or floating charge realizations, the costs should be borne by the funds pro rata (see pp 594I and 595A–B).

[Bahasa Malaysia summary

Perayu telah dilantik oleh United Asian Bank Bhd ('bank tersebut') sebagai penerima dan pengurus kepada Rajiv Enterpries Sdn Bhd ('Rajiv') mengikut terma-terma suatu debentur. Aset-aset Rajiv akhirnya dijual dan jumlah sebanyak RM138,343.57 diperolehi setelah ditolak kos penerimaan. Terdapat tiga pemiutang kepada Rajiv yang menuntut jumlah itu yang sekarang berada di dalam tangan perayu. Mereka adalah: (i) bank tersebut yang menuntut jumlah yang kena bayar dan terhutang di bawah terma-terma debentur; (ii) Kerajaan Malaysia yang menuntut jumlah cukai jualan yang kena bayar untuk tahun-tahun 1984–1986; dan (iii) pekerja-pekerja Rajiv ('pekerja-pekerja') yang menuntut faedah pemberhentian dll yang kena bayar mengikut award di bawah s 69 Akta Kerja 1955. Aset-aset tidak mencukupi untuk memenuhi tuntutan-tuntutan ketiga-tiga pemiutang. Perayu memohon kepada Mahkamah Tinggi untuk arahan di bawah s 183(3) Akta Syarikat 1965 ('Akta 1965'). Perayu menegaskan bahawa bank tersebut berhak kepada jumlah yang dipegang oleh perayu kerana jumlah yang dipegang adalah realisasi aset-aset yang digadai kepada bank tersebut oleh sebab debentur. Pihak kerajaan menegaskan bahawa ia berhak kepada prioriti oleh sebab s 70 Akta Cukai Jualan 1972 ('Akta 1972') atau s 10 Akta Prosiding Kerajaan 1956 ('Akta 1956'). Pekerja-pekerja menuntut bahawa mereka

mempunyai prioriti oleh sebab bahawa tuntutan mereka termasuk di dalam pengertian 'pampasan pekerja' dalam s 191 apabila dibaca bersama dengan s 292(c) Akta 1965. Bagaimanapun, dalam penghujahan bertulisnya, peguam pekerja-pekerja mengakui bahawa pekerja-pekerja berhak dan sekarang menuntut hanya jumlah sebanyak RM21,000 di bawah s 292(1)(b) Akta 1965. Tuntutan ini disetujui oleh perayu. Mahkamah Tinggi mengarahkan bahawa tuntutan kerajaan berkaitan dengan taksiran cukai jualan mengikut Akta 1972 dibayar sebagai prioriti kepada tuntutan bank tersebut sebagai pemegang debentur. Perayu membuat rayuan. Pihak kerajaan menegaskan bahawa untuk menentukan tuntutan yang bercanggah, mahkamah hanya perlu melihat kepada Akta 1972. Peruntukan-peruntukan ss 191 dan 292 Akta 1965 dan s 10 Akta 1956 adalah tidak relevan. Adalah dihujahkan bahawa semua wang yang dikumpulkan oleh seseorang yang boleh dikenakan cukai sebagai cukai jualan daripada pembeli-pembeli adalah dikumpulkan bagi pihak kerajaan. Oleh itu, wang yang dikumpulkan adalah kepunyaan kerajaan dan persoalan prioriti tidak timbul.

Diputuskan, membenarkan rayuan:

(1) Adalah mesti dianggap sekarang sebagai tetap bahawa ss 69 dan 70 Akta 1972 tidak beroperasi untuk mengurniakan apa-apa prioriti kepada cukai jualan terhadap hutang-hutang lain dan bahawa s 292(1) Akta 1965 mesti dibaca sebagai pengecualian kepada peruntukan am s 10(1) Akta 1956 (lihat ms 591F); *Director of Customs, Federal Territory v Ler Cheng Chye* (*Liquidator of Castwell Sdn Bhd, in liquidation*) [1995] 2 MLJ 600 diikut.

(2) Adalah silap untuk mengatakan bahawa peruntukan-peruntukan ss 191 dan 292 Akta 1965 tidak terpakai. Apabila penerima dilantik, ss 191 dan 292 akan beroperasi. Walaupun betul bahawa orang yang boleh dikenakan cukai mengumpul cukai jualan untuk kerajaan, kerajaan tidak boleh menuntut prioriti terhadap wang tersebut apabila penerima dilantik. Penghujahan itu hanya dapat dipertahankan jika wang yang dikumpulkan oleh Rajiv sebagai cukai jualan dimasukkan dalam akaun istiwewa yang berasingan. Tetapi, tidak ada keterangan bahawa wang yang dikumpul dimasukkan ke dalam akaun tersebut. Ianya mesti telah dimasukkan ke dalam akaun campuran Rajiv (lihat ms 591I dan 592A–B).

(3) Oleh itu, hakim perbicaraan adalah salah dalam mengarahkan bahawa cukai jualan yang perlu dibayar kepada kerajaan dibayar sebagai prioriti kepada tuntutan pemegang debentur (lihat ms 592B–C).

(4) Oleh kerana tuntutan pekerja-pekerja untuk jumlah RM21,000 telah disetujui oleh perayu, tidak ada pertikaian di antara perayu dan pekerja-pekerja bahawa pekerja-pekerja adalah berhak untuk dibayar sebagai prioriti kepada tuntutan pemegang debentur.

Tetapi, pekerja-pekerja hanya berhak untuk dibayar daripada realisasi caj terapung dan bukan daripada realisasi caj tetap (lihat ms 593H).

(5) Jumlah sebanyak RM20,000 yang merupakan perlucuthakan deposit kepada jualan aset-aset tetap patut dikira sebagai realisasi caj tetap dan oleh itu tidak boleh dibahagikan kepada pekerja-pekerja (lihat ms 594A).

(6) Bukan semua caj terapung boleh dibahagikan kepada pekerja-pekerja. Sebahagian daripada jumlah itu mesti terlebih dahulu digunakan untuk membayar sebahagian kos dan perbelanjaan penerimaan (lihat ms 594B–C).

(7) Mengikut terma-terma debentur, kos penerimaan diberi prioriti ke atas tuntutan-tuntutan lain termasuk pemegang debentur. Kos tersebut juga mempunyai prioriti ke atas tuntutan bank untuk dibayar daripada aset-aset yang tertakluk kepada caj tetap. Oleh itu, kos penerimaan boleh dibayar sama ada daripada realisasi caj tetap atau realisasi caj terapung kerana debentur tidak menyebut mengenai perkara ini (lihat ms 594C, E–F).

(8) Jumlah yang diperolehi oleh bank dan pekerja-pekerja bagi pembayaran tuntutan-tuntutan mereka bergantung kepada daripada dana mana kos penerimaan dibayar (lihat ms 594G–H).

(9) Cara yang wajar adalah untuk membahagi-bahagikan kos penerimaan di antara dana realisasi caj terapung dan dana realisasi caj tetap. Untuk melakukankannya, terlebih dahulu mesti ada taksiran kos yang ditanggung dalam mengrealisasi aset caj tetap dan aset caj terapung dan kos penerusan perniagaan syarikat untuk memperolehi dana realisasi caj terapung. Selepas itu, kos mengrealisasi aset caj tetap perlu ditolak daripada realisasi caj tetap dan kos mengrealisasi aset caj terapung perlu ditolak daripada dana realisasi caj terapung. Berkaitan dengan kos yang tidak boleh dikatakan berpunca daripada realisasi caj tetap atau realisasi caj terapung, kos itu perlu ditanggung oleh dana itu secara pro rata (lihat ms 594I dan 595A–B).]

Notes

For cases on priorities, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 538–544

Cases referred to

Anuarul Aini & Anor v Ketua Pengarah Kastam Dan Eksais Diraja Malaysia, Johore Bahru [1991] 1 MLJ 360

Director of Customs, Federal Territory v Ler Cheng Chye (Liquidator of Castwell Sdn Bhd, in liquidation) [1995] 2 MLJ 600

Indo Malaysia Engineering Co Bhd v Muniandy Rengasamy & Ors [1990] 3 MLJ 301

Waters v Widdows (1984) VR 503

Legislation referred to

Companies Act 1965 ss 191, 292(1)
Government Proceedings Act 1956 s 10
Sales Tax Act 1972 s 70

Appeal from: Originating summons No R8–24–123–89 (High Court, Kuala Lumpur)

S Suhendran (*Saheran & Woon*) for the appellant.
Allaudeen Ismail (Senior Federal Counsel) (Kastam & Eksais Diraja, Malaysia) for the first and second respondents.

Cur Adv Vult

Wan Adnan FCJ (delivering the judgment of the court): By this originating summons, the appellant applied to the High Court for the following directions under s 183(3) of the Companies Act 1965 ('the 1965 Act'):

(a) (i) whether, upon the true construction of s 70 of the Sales Tax Act 1972, sums due from a company in the form of tax assessed under the said Sales Tax Act 1972 is to be paid by a receiver and manager of the company in priority to a claim of a holder of a debenture registered under s 108 of the Companies Act 1965 out of assets of the company charged thereby;

(ii) if the answer to (a)(i) above is in the affirmative, whether the sums claimed by the defendants from Rajiv Enterprises Sdn Bhd (in receivership) by way of sales tax is to be paid by the plaintiff out of realizations of assets subject to a fixed charge granted in favour of United Asian Bank Bhd as the debenture holder concerned in priority to the claim of the said debenture holder;

(iii) if the answer to (a)(i) and (ii) above is in the affirmative, whether the plaintiff as the receiver and manager is entitled to first utilize the realizations of assets subject to the floating charge in satisfaction of sums claimed by the defendants before utilizing fixed charge realizations;

(iv) if the answer to (a)(i) and (ii) above is in the affirmative, whether the claim of the defendants by way of sales tax is to be paid in priority to the costs of the receivership and the remuneration of the receiver and manager;

(b) whether upon the true construction of s 70 of the Sales Tax Act 1972, sums due in the form of tax assessed under the Sales Tax Act 1972 is to be paid in priority to a claim of the preferential creditors within the meaning attributed thereto by ss 191 and 292 of the Companies Act 1965;

(c) whether upon the true construction of s 191 when read together with s 292 of the Companies Act, sums due in the form of tax assessed under the Sales Tax Act 1972 prior to the appointment of a receiver and manager is a preferential debt to be paid by the plaintiff in priority to a claim of a holder of a debenture registered under s 108 of the Companies Act 1965; and

A (d) the manner in which the realizations of the assets of Rajiv Enterprises Sdn Bhd ought to be utilized in meeting the claims of the defendants, the costs of the receivership, the said debenture holder and the preferential creditors of Rajiv Enterprises Sdn Bhd.

The learned High Court judge after hearing the parties and relying on the B case of *Anuarul Aini & Anor v Ketua Pengarah Kastam Dan Eksais Diraja Malaysia, Johore Bahru* [1991] 1 MLJ 360 directed that the claims of the government in respect of sales tax assessed pursuant to the Sales Tax Act 1972 ('the 1972 Act') be paid in priority to the claims of the debenture holder.

C The appellant now appeals against that direction.

The appellant is the receiver and manager of Rajiv Enterprises Sdn Bhd ('Rajiv') appointed by the United Asian Bank Bhd ('the Bank') on 29 December 1988 pursuant to the terms of the debenture dated 15 November 1980. The appellant managed Rajiv for profit and later sold the assets of Rajiv. The statement of receipts and payments in respect of the sale is as D follows:

(1)	Sale of fixed assets	–	RM144,000
(2)	Sale of floating charge assets	–	2,000
(3)	Received from trading	–	60,600
E (4)	Forfeiture of deposit for sale of machinery and equipment under the fixed charge	–	20,000
			226,600
F	Less costs of receivership	–	88,256.43
	Total realization		RM138,343.57

There are three creditors of Rajiv that compete for the monies now in the G hands of the appellant namely the sum of RM138,343.57. They are:

(1) the bank for the sum of RM633,326.68 due and owing under the terms of the debenture;

(2) the Government of Malaysia who claims the sum of RM105,585.10 by way of sales tax for the years 1984 to 1986; and H

(3) the employees of Rajiv who claim RM138,290.44 which are sums due by way of termination benefits etc pursuant to an award under s 69 of the Employment Act 1955 made on 6 May 1989.

There are insufficient assets to meet the claims of all the three creditors. I Hence, the application for directions under s 183(3) of the 1965 Act .

The appellant maintained that the bank was entitled to the sums that were held by the appellant as the sums that were so held were the realizations of assets charged to the bank by virtue of the debenture. The government

maintained that they were entitled to priority by reason of s 70 of the 1972 Act or s 10 of the Government Proceedings Act 1956 ('the 1956 Act'). The employees claimed they had priority by reason that their claim fell within the definition of 'worker's compensation' in s 191 when read together with s 292 (c) of the 1965 Act.

The learned judge gave his decision on 29 November 1993. In his written judgment, he said that he was bound to follow the decision in *Anuarul Aini & Anor v Ketua Pengarah Kastam dan Eksais Diraja Malaysia, Johore Bahru* [1991] 1 MLJ 360 since that decision had been approved by the then Supreme Court. The learned judge said:

> As has been stated, it is conceded by the applicant that the authority which settles the law is the case of *Anuarul Aini & Anor v Ketua Pengarah Kastam dan Eksais Diraja Malaysia, Johore Bahru* [1991] 1 MLJ 360 since it has the approval of the Supreme Court. At p 363 the learned judge wrote:
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> > 'As sales tax is a civil debt, then s 10 of the Government Proceedings Act 1956 applies. Section 10 gives this debt a preferential treatment for payment over 'all debts or claims of every kind which shall subsequent to such date, have been contracted or incurred by or become due from such person to any other person whomsoever 'except' any right vested in any person by virtue of a mortgage or charge of immovable property duly registered in the manner provided by law for the registration of such mortgage or charge'.'

Since the learned judge's decision, the Federal Court had come out with a decision on the matter in the case of *Director of Customs, Federal Territory v Ler Cheng Chye (Liquidator of Castwell Sdn Bhd, in liquidation)* [1995] 2 MLJ 600.

In this case, the liquidator had come to the High Court also on the issue of priority.

Wan Yahya FCJ, speaking for the Federal Court, said (at pp 604–605):

> The stand taken by the Customs in the High Court was based on the argument of a conflict between s 69(1) of the Sales Tax Act 1972 and s 292 of the Companies Act 1965 in which case the maxim *lex posterior derogat priori* should apply and secondly the Sales Tax Act 1972 being a special law enacted after the Companies Act 1965, the principle of *generalia speciablibus non derogant* should likewise be applied. Lastly, counsel contended that s 10(l) and (2) of the Government Proceedings Act 1956 would in any event confer priority of the payment of the sales tax over claim of the debenture holders.
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> The learned judge then adopting the same rationale as in *Anuarul Aini & Anor v Ketua Pengarah Kastam & Eksais Diraja Malaysia, Johore Bahru* [1991] 1 MLJ 360, held that s 69 of the Sales Tax Act 1972 is an administrative direction, and as such the provisions of that section did not conflict with that of s 292 of the Companies Act 1965. Accordingly, the learned judge held that the maxim *lex posterior derogant priori* did not apply and so he ruled that the Customs were not entitled to any priority under s 69 of the Sales Tax Act 1972.

The central point of argument before the High Court appeared to have been for the most part directed at the implication on s 292 of the Companies Act 1965 and s 69 of the Sales Tax Act 1972. Perhaps for that reason, another relevant provision of the law, ie s 10(1) of the Government Proceedings Act 1956 was not adequately adjudicated on.

The Federal Court then considered s 69 of the 1972 Act which reads as follows:

> Where after the passing of this Act an effective resolution is passed or an order is made for the winding-up of a company which is a licensed manufacturer the liquidator of the company shall give notice thereof to the Director General within fourteen days thereafter, and shall before disposing of any of the assets of the company set aside such sum out of the assets as appears to the Director General to be sufficient to provide for any sales tax that is or will thereafter become payable in respect of the company.

Wan Yahya FCJ continued:

> Two High Court authorities of particular application to the above section were cited in argument before us. The first of the two is the case of *Anuarul Aini & Anor v Ketua Pengarah Kastam & Eksais Diraja Malaysia, Johore Bahru* [1991] 1 MLJ 360.
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> In that decision, the learned trial judge held ,inter alia, that: (i) s 70 of the 1972 (in our appeal, s 69) merely sets out the duties of the receivers and does not provide a priority of payment for sales tax over other debts; and (ii) sales tax being a civil debt is subject to a preferential payment over other debts.

After considering the Australian High Court decision in the *Federal Commissioner of Taxation and Anor v Official Liquidator of EO Farley Ltd (In Liquidation) & Anor* (1940) 63 CLR 278, the Federal Court said (at pp 607–608):

> We are entirely in agreement with the above rationale. If at all the Customs has priority right, it must be a right over a debt as a whole where the amount is specified. Section 69 of our Sales Tax Act 1972 does not, in terms of its construction, direct payment away of the money so set aside nor does it instruct in any way how that money is to be applied, and yet the Sales Tax Act 1972 was enacted well after the Companies Act 1965. The only requirement contained in that section is for the liquidator to set aside a sum sufficient to provide for tax payable then or thereafter. The sum to be set aside pursuant to the statute may not be necessarily the same as what is actually payable. The Legislature could not have forgotten about the priority right as contained in s 292 of the Companies Act 1965 when it enacted that provision on the Sales Tax Act 1972. On the true construction of these two sections, we conclude that the omission to mention both matters, ie on payment out and priority were deliberate acts of the legislature. We are firmly of the view that s 69 of the Sales Tax Act 1972 is merely directive in nature. It merely directs the setting aside of moneys sufficient to provide for taxation but does not provide that Government debts shall rank in priority to all other secured debts. If the legislature had intended otherwise, it would have conferred that privilege in as clear and unequivocal words as possible.

The Federal Court then went to consider the effect of s 10(1) of the 1956 Act over s 292(1) of the 1965 Act. After considering the provisions of the two sections, the Federal Court said: A

> Sales tax is a federal tax within the meaning of s 292(l)(f) of the Companies Act 1965 and being a tax due to the government, it would likewise fall under the provision of s 10(1) of the 1956 Act. Discernibly, there is a conflict between the Government proceedings Act 1956 which conferred priority to the sales tax above all debts and the Companies Act 1965 which ranked such tax as the sixth in priority amongst unsecured debts. B
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> Where there are two conflicting provisions of the legislature and the question arises which of the two should govern the case, it is the court's duty to see the terms of which provisions are more appropriate in the circumstance of the case. The principle of linguistic cannons of construction on the use of legal maxims may provide the answer to our case. C
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> The relevant maxim in the present appeal is *generalia specialibus non derogant* — general statements or provisions do not derogate from special statements or provisions, or conversely, *specialia derogant generalibus* — special provisions derogate from general. The Government Proceedings Act 1956 was enacted to provide generally the rights of the government to sue, its liability, jurisdiction and procedure. Section 10(1) provides in non-specific and general terms that all debts due and claims owing to the government shall enjoy preferential payments over other competing debts or claims which arise subsequent to the date of accrual of such government claim. The phrases 'all debts due'; 'claims of every kind'; 'from such persons to any other person whomsoever' are plainly general words and general words are to be understood generally — *generalia verba sunt generalita intelligenda.* D E
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> In contrast, ss 291 and 292 of the Companies Act 1965 are special provisions dealing with a subject distinctive to companies. They relate to the respective rights of secured and unsecured creditors in a winding up of an insolvent company and make express mention of federal tax (which by virtue of s 23 of the Sales Tax Act 1972 or other related legislation is a debt due to the government) as ranking sixth in the list of priority amongst other unsecured preferential debts. We have no hesitation in holding that s 292(1) of the Companies Act 1965 is a special provision dealing with a particular subject and that it is in conflict with s 10(1) of the Government Proceedings Act 1956. Nevertheless, we must also assume that the legislature must have had in mind the latter Act when enacting the subsequent Companies Act 1965 and did not intend to abrogate it altogether. The general rule of construction is such if having made the general Act the legislature afterwards makes a special provision in conflict with the earlier legislation, the special provision so in conflict is treated as a mere exception to the general provision. F G H

The Federal Court then concluded:

> We are therefore of the view that the maxim *specialia generalibus derogant* applies, and s 292(1) of the Companies Act 1965 must be read as an exception to the general provision of s 10(1) of the Government Proceedings Act 1956 but otherwise the latter section prevails over other debts. I

Finally, the Federal Court said (at p 613):

A On the aforestated reasonings and determination, we have arrived at the conclusion that the proper provisions to apply in deciding the priority of payments in respect of the claims for debt arising from non payment of sales tax are ss 291 and 292 of the Companies Act 1965, and the relevant date for the application of priority in this case is the date on which the liquidator was appointed. In our present case, the event took place on 14 B July 1986. On that date the floating charge became automatically crystallised and the debenture holders' claim was therefore transfixed into a secured debt. On the other hand, the sales tax claim by the Customs is unaffected by the event and continues to retain its characteristic as an unsecured civil debt which ranked sixth in order of priority in that category of debts. The outcome from this situation in this case is obvious. The automatically C crystallized debenture debts having attained the characteristic of a secured debt must be paid first in preference over the unsecured sales tax debts.

Before us, the learned Senior Federal Counsel invited us to again reconsider *Anuarul*'s case and *Ler Cheng Chye*'s case. If we were to accede to this request, it would result in the same matter being considered by the D Federal Court/Supreme Court three times. The request for the second review of *Anuarul*'s case made in *Ler Cheng Chye* was described by the Federal Court as 'a brave attempt at reargument of the law in view of the statement from the Bar that the issue in *Annuarul*'s case in s 69 was subsequently taken up, argued before and confirmed by the Supreme Court.'

E However, the Federal Court did accede to the request and considered *Anuarul*'s case afresh and 'having done so', the Federal Court said 'we have with respect, arrived at the same conclusion on the issue of s 69 as the previous panel of the Supreme Court and the trial judge did.

We have to decline this request. It must now be regarded as settled F that ss 69 and 70 of the1972 Act do not operate to confer any priority for sales tax over other debts. It must also be regarded as settled as decided by the Federal Court in *Ler Cheng Chye* that s 292(1) of the 1965 Act must be read as an exception to the general provisions of s 10(1) of the 1956 Act.

G The learned Senior Federal Counsel then argued that in order to determine the issue of the conflicting claims, the court should only look at the provisions of the 1972 Act. The provisions of ss 191 and 292 of the 1965 Act and of s 10 of the 1956 Act were entirely irrelevant. According to him, the 1972 Act is a special Act which deals with the taxation of all imported and manufactured goods. It ensured that all imported and H manufactured goods are sold fully taxed and paid. He referred to ss 6, 16, 17, 19, 22, 26, 28 and 70 of the 1972 Act and submitted that from these provisions it was clear that all monies collected by a taxable person as sales tax from the purchasers are collected on behalf of the government. The monies collected belonged to the government. The question of I priority did not arise. The monies were already government monies.

After giving careful consideration, we are of the view that it is erroneous to say that the provisions of ss 191 and 292 of the 1965 Act do

not apply. Once a receiver has been appointed, ss 191 and 292 will come into play. Whilst it is true that a taxable person collects the sales tax for the government, the government cannot claim priority over such monies once a receiver has been appointed. The argument will be tenable only if the monies collected by Rajiv as sales tax were put into a separate special account. But, there is no evidence that monies collected as sales tax were put into such an account. They must have been put into the mixed account of Rajiv.

We are therefore of the view that the learned judge was wrong in directing that sales tax due to the government be paid in priority to the claim of the debenture holder. The direction is therefore set aside.

Now we will consider the claim of the employees whose claim as stated earlier amounted to RM138,290.44 which are sums due to them by way of wages, overtime pay, indemnity in lieu of notice, annual leave pay and termination benefits pursuant to an award under s 69 of the Employment Act 1955 made on 6 May 1989.

The employees originally alleged that their claim took priority over the debts of the bank by virtue of s 191 when read together with s 292 (1)(c) of the 1965 Act.

Section 191 of the 1965 Act provides as follows:

> 191 Payments of certain debts out of assets subject to floating charge in priority to claims under charge
>
> (1) Where a receiver is appointed on behalf of the holders of any debentures of a company secured by a floating charge or possession is taken by or on behalf of debenture holders of any property comprised in or subject to a floating charge, then if the company is not at the time in the course of being wound up, debts which in every winding-up are preferential debts and are due by way of wages salary vacation leave or superannuation or provision fund payments and any amount which in a winding up is payable in pursuance of section 292 (3) or (5) shall be paid out of any assets coming to the hands of the receiver or other person taking possession in priority to any claim for principal or interest in respect of the debentures and shall be paid in the same order of priority as is prescribed by that section in respect of those debts and amounts.
>
> (2) For the purposes of subsection (1) the references in section 292 (1)(b), (c), (d) and (e) to the commencement of the winding up shall be read as a reference to the date of the appointment of the receiver or of possession being taken as aforesaid (as the case requires).
>
> (3) Any payments made under this section shall be recouped as far as may be out of the assets of the company available for payment of general creditors.

Section 292 (1) provides as follows:

> 292 Priorities
>
> (1) Subject to this Act, in a winding up there shall be paid in priority to all other unsecured debts—

(a) firstly, the costs and expenses of the winding up including the taxed costs of a petitioner payable under section 220, the remuneration of the liquidator and the costs of any audit carried out pursuant to section 281;

(b) secondly, all wages or salary (whether or not earned wholly or in part by way of commission) including any amount payable by way of allowance or reimbursement under any contract of employment or award or agreement regulating conditions of employment, of any employee not exceeding one thousand five hundred ringgit [or such other amount as may be prescribed from time to time] whether for time or piecework in respect of services rendered by him to the company within a period of four months before the commencement of the winding up;

(c) thirdly, all amounts due in respect of worker's compensation under any written law relating to worker's compensation accrued before the commencement of the winding up;

(d) fourthly, all remuneration payable to any employee in respect of vacation leave, or in the case of his death to any other person in his right, accrued in respect of any period before the commencement of the winding up;

(e) fifthly, all amounts due in respect of contributions payable during the twelve months next before the commencement of the winding up by the company as the employer of any person under any written law relating to employees superannuation or provident funds or under any scheme of superannuation or retirement benefit which is an approved scheme under the federal law relating to income tax; and

(f) sixthly, the amount of all federal tax assessed under any written law before the date of the commencement of the winding up or assessed at any time before the time fixed for the proving of debts has expired.

But, in his written submission to the court below, the learned counsel for the employees conceded that the employees were entitled to and they now claimed only the sum RM21,000 under s 292(1)(b) of the 1965 Act. This concession must have been made in the light of the Supreme Court decision in *Indo Malaysia Engineering Co Bhd v Muniandy Rengasamy & Ors* [1990] 3 MLJ 301. Each of the 14 employees now only claim the sum of RM1,500 being the maximum amount allowed under the subsection. This claim was agreed to by the learned counsel for the appellant. There was therefore no dispute between the appellant and the employees that the employees are entitled to be paid that sum in priority to the claim of the debenture holder. But, the employees are only entitled to be paid out of floating charge realizations and not out of fixed charge realizations. Therefore, the remaining dispute between them concerns, firstly, what the actual floating charge realizations are, and secondly, whether the entire floating charge realizations are available for the payment of the preferential claims of the employees.

The employees said that the assets that are subject to the floating charge amount to RM82,600, whereas the appellant said the assets amount

to only RM62,600. The dispute is whether the sum of RM20,000 which was the forfeiture of a deposit for the sale of fixed assets should be considered as a fixed charge realization or floating charge realization. In this respect, we agree with counsel for the appellant that as the said sum of RM20,000 was directly obtained from an aborted sale of fixed charge assets, it should be considered as monies subject to the fixed charge. Therefore, in our view, there is only the sum of RM62,600 that are floating charge realizations. But, we are of the view that not all of the said sum is available for distribution to the employees. A portion of that sum must first be used to satisfy a portion of the costs and expenses of the receivership.

By the terms of the debenture, the receivership costs are given first priority over all other claims including the claims of the debenture holder. (See cl 12 of the debenture dated 28 February 1979). The receivership costs incurred are as follows:

(a)	Employees' salaries and EPF contributions	–	RM25,532.08
(b)	Receiver and manager's fee	–	RM16,380
(c)	Costs of receivership	–	RM46,433
	Total costs		RM88,345.08

The receivership costs also have priority over the claim of the bank to be paid out of the assets subject to the fixed charge. Accordingly, we have a situation where the receivership costs can be paid out of either the fixed charge realizations or the floating charge realizations. The debenture is silent as to from which realizations the receivership costs are to be paid out.

There are clearly two different and distinct funds in the hands of the appellant. The first is the fixed charge realizations which amount to RM164,000 and the other is the floating charge realizations which amount to RM62,600. The total receivership costs amount to RM88,345.08. It is not disputed that the bank is entitled to the whole amount of the fixed charge realizations and that the employees are entitled to be paid only out of the floating charge realizations. The amount that the bank on the one hand, and the employees on the other, will actually receive in satisfaction of their claims, will depend on which fund the receivership costs are paid out. It is clear that if the receivership costs are to be paid wholly out of the floating charge realizations fund, there will be nothing left to satisfy the employees' preferential claim. This will not be fair. Similarly, if the receivership costs are to be paid solely out of the fixed charge realizations fund, the bank will have to suffer the entire payment of the costs of the receivership. This also is not fair. In our view, the proper way to deal with the problem is to apportion the receivership costs between the floating charge realizations fund and the fixed charge realizations fund. In order to do that there must first be an assessment as to the costs of realizing the

A fixed charge assets and the costs incurred in realizing the floating charge assets and the carrying on of the business of the company to obtain the floating charge realizations fund. Then, the costs of realizing the fixed charge assets should be deducted from the fixed charge realizations fund and the costs of realizing the floating charge realizations should be deducted from the floating charge realizations fund. In relation to costs that cannot be attributed towards the realizations of either the fixed or floating charge realizations, the costs should be borne by the funds prorata.

Similar formula was applied in *Waters v Widdows* (1984) VR 503 (Supreme Court of Victoria) when the receiver was faced with a similar problem.

In the result, the amount that will be available from which the claims of the employees are to be paid out will be the sum of RM62,600 less the amount ascertained as the costs and expenses and fees of the appellant that are attributable to the floating charge realizations and the apportioned pro rata costs and expenses of the appellant that cannot be attributable to either the floating charge realizations or the fixed charge realizations.

For the above reasons, we allow the appeal with costs here and below (deposit to be returned to the appellant) and we make the following orders in respect to the various prayers:

1 Prayer (a)(i) – No

2 Prayers (a) (ii), (iii), (iv) – Do not arise.

3 Prayer (b) – No

4 Prayer (c) – No

5 Prayer (d):

(a) Fixed charge realizations:

The claim of the bank will take priority over claims of both the government (the first and second defendants) and the employees.

(b) Floating charge realizations:

The employees' claim for the sum of RM21,000 under s 292(1)(b) of the Act will take priority over the claim of the bank and for the purpose of determining the amount of floating charge realizations that will be available for such purpose, there shall be the following further orders:

(i) the costs and expenses and fees of the appellant that are attributable to the realizations of the fixed charge assets be determined by the parties and be deducted from the fixed charge realizations fund;

(ii) the costs and expenses and fees of the appellant that are attributable to the floating charge realizations be determined by the parties;

(iii) the costs and expenses of the appellant that cannot be properly attributable to either the floating charge realizations or the fixed charge realizations apportioned pro rata between each fund;

(iv) the total of (b) and the pro rated amount of costs apportioned to the floating charge realizations in (c) above be then deducted from the sum of RM62,600 and the ultimate balance is the sum out of which the preferential claims of the employees are to be paid; and

(v) The parties shall have liberty to apply.

Order accordingly.

Reported by Ringo KL Low